No. 98-252

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In The

Supreme Court of the United States

October Term, 1997

FATHER JOHN HENGLE, OUR LADY OF VICTORY CHURCH and THE CLEVELAND CATHOLIC DIOCESE,

Petitioners,

vs.

BROTHER GABRIEL WARD,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeals, State of Ohio, Ninth Judicial District

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Petitioners have substantially misrepresented the underlying facts of this case, and the actual legal issues that arose from those facts and which were actually decided by the state courts below. Petitioners have persistently and erroneously claimed throughout the extended history of this case — at trial, in the court of appeals, before the Ohio Supreme Court, and now before this Court — that this case involved an "inner-church controversy" over interpretation of religious doctrine, that Brother Gabriel was "falsely impersonating" or "misrepresenting" himself as a member of a sanctioned or recognized order within the structure of the church, that an adverse decision in this case would "materially alter" their own religious practice, and that the courts below engaged in the unconstitutional interpretation, evaluation, and determination of issues of religious doctrine and inner-church governance. Significantly, however, Petitioners failed to present at trial or to point out to the court of appeals, to the Ohio Supreme Court — or to this Court — any evidence in the record to support such assertions. This is for good reason, as there is no such evidence in the record. (*See* Opinion of Court of Appeals, Petitioners' Appendix at 8a-9a, 12a). A brief overview of the essential facts upon which the judgments of the lower courts were based is therefore in order.

In the summer of 1979, after graduating from college and spending several years in a variety of occupations, Edward P. Ward began to experience a profound personal calling from God to dedicate himself to a religious life. (Trial Court Record at 162-166). In a private religious ceremony Mr. Ward, along with his friend, Joseph Guzzo, made a formal vow to live a religious life of poverty, chastity, and obedience. (Rec. 170). At this ceremony, Ward and Guzzo adopted the names of Brother Gabriel and Brother Raphael, respectively, and

dedicated themselves to the goal of establishing a religious community, the Brothers of the Annunciation of Mary, that would be dedicated to helping the poor and doing God's work.

While the Brothers derived their personal religious philosophy from the teachings of the Catholic St. Francis, they did not wish merely to join an established Franciscan order within the Catholic Church, but sought from the beginning to create their own independent community. Based on their personal religious interpretation of the writings of St. Francis, the Brothers believed it was necessary to wear a common garb — a monk's habit — both publicly and privately, as an outward manifestation of their inner dedication to a religious life. They chose the unique color blue for their habits, in order to distinguish their group from any established, traditional Franciscan orders within the Catholic church. (Rec. 227, 391). The wearing of the habit became to Brother Gabriel a fundamental aspect of both his daily life and the practice of his religious beliefs, from the time he made his personal religious vow in 1979 to the present. (Rec. 169-174, 187-193, 213, 226-227, 246-249, 251).

For approximately seven years, the Brothers operated a group home for the purpose of giving care to the poor, the retarded, and the mentally ill, on the grounds of a convent at St. Edward's Parish in Akron, Ohio. In 1986, they moved their home to the campus of Edwin Shaw Hospital in Springfield, Ohio, and called their new home the "Queen of Angels Monastery". In order to support their monastery and their work for the poor and retarded, the Brothers would do various jobs in the outside community, and their respective incomes would go directly to the common fund of the monastery to supplement monies obtained from community support services. (Rec. 179-182).

Since 1986, Brother Gabriel had worked for Petitioner Our Lady of Victory Church in Tallmadge, Ohio, maintaining and programming the parish's computer system. This position did not involve any aspect of the religious ministry or mission of the parish, and did not involve any contact with parishioners or the public at large as a representative of the church. (Rec. 309-311). Brother Gabriel primarily worked alone, in the basement of the church. He wore his habit at all times during his tenure there, from 1986 through June of 1994. His stipend was paid directly to the Brothers of the Annunciation of Mary.

Through the years to 1993, the Brothers had varying sponsorship for their community from within the Catholic Church. Until 1988, they had the sponsorship of Petitioner Diocese of Cleveland (a Roman Rite diocese), which was withdrawn because the community was not "growing" as desired by the diocese. They then sought and obtained sponsorship from a diocese of the Maronite Rite, which required that the Brothers change their affiliation within the church from the Roman Rite to the Maronite Rite. (Rec. 174-177). This sponsorship was likewise withdrawn for the same reason in December of 1993.

Shortly after the Brothers lost the sponsorship of the Maronite Rite, a meeting took place between the Brothers and representatives of Bishop Anthony Pilla (the head of the Catholic Diocese of Cleveland) to discuss their situation. At this meeting, the Brothers were *requested* by the representatives to stop wearing their habits because they no longer had any formal sponsorship within the Catholic church. The Brothers informed the representatives that they could not accede to this request, as it would be contrary to their religious beliefs and practices. (Rec. 279-280). At this meeting, it was decided that the bishop's representatives would draft and publish a notice in the *Diocesan Memorandum*, a regular publication that was

circulated to the diocese members at large, which made it clear that the Brothers had no formal sponsorship within the Catholic Church, and which stated that they had been *asked* not to wear their habits. Rather than forsake the wearing of their habits, the Brothers agreed that such an announcement was appropriate, and resolved to continue as a religious community without any formal sponsorship or recognition from the Catholic Church. (Rec. 283-286, 297-299). At no time during this meeting was there any discussion of forsaking the wearing of the habit as a condition of continued employment. (Rec. 283). While at trial Petitioners' representatives continuously characterized the bishop's request as a "directive" from the bishop, these same representatives admitted that the bishop had no authority or jurisdiction to issue orders or directives over religious observance or practice to anyone outside the Roman Rite, nor even to anyone outside his diocese, and specifically admitted that the bishop had no jurisdiction or authority to issue "directives" to Brother Gabriel in this regard. (Rec. 292-293, 352-353).

In February of 1994, an extensive cover-page article about the Brothers was published in the Sunday magazine of the *Akron Beacon Journal*, Akron's major mass-circulation newspaper, which generally traced the history of the Brothers' struggles to establish their monastery, and in which the Brothers publicly reaffirmed their resolve to continue in their religious life and practices without any formal sponsorship or recognition from Catholic church hierarchy. (Rec. 303-305).

In June of 1994, Petitioner Father John Hengle, who had become pastor of Our Lady of Victory Church approximately one year earlier, prepared a written contract for the one-year renewal of Brother Gabriel's employment, along with a written job description. As admitted by Father Hengle, the duties outlined in the job description were purely secular, and did not

in any way involve the religious functions of the church, nor any contact with parishioners or the public at large in any representative capacity. (Rec. 309-313). Incorporated into the contract by reference was the parish's "Personnel Practice Guidelines", which Father Hengle had also prepared. In this document, Father Hengle expressly stated that the parish would not discriminate in employment on the basis of religion "where religion is not considered by the parish to be significant to the position". Father Hengle testified that religion was **not** significant to the position for which Brother Gabriel was to be rehired. (Rec. 321). Since January 1991, there also had been a policy in effect regarding employment practices for the Cleveland diocese at large, which was put in writing in a manual entitled "Parish as Employer", which was adopted and signed by Bishop Pilla, and which prescribed *mandatory* employment policies for all parishes in the diocese. (Rec. 270-274, 287-289). In this document, the bishop expressed the commitment of the diocese to being an "equal opportunity employer", and specifically avowed that no employee or applicant would be discriminated against on the basis of religion. (Rec. 270).

The employment contract was presented to Brother Gabriel in a meeting with Father Hengle on June 28, 1994. While the contract contained an integration clause stating that the entire agreement of the parties was contained in this writing, there was nothing in the contract regarding a dress code generally, nor any express condition that Brother Gabriel not wear his habit. (Rec. 211, 318-319). At this meeting, Father Hengle informed Brother Gabriel for the first time of an oral condition to entering into the contract — that he no longer wear his habit. (Rec. 204, 321-322).

Brother Gabriel was devastated. He informed Father Hengle of the significance of wearing the habit in his personal religious practice, and of the crisis that this was causing him.

(Rec. 209, 213, 411). Despite being so informed, Father Hengle admitted that he made no attempt whatsoever at accommodation to Brother Gabriel's religious convictions and practices, despite the fact that, as he admitted, the wearing of the habit created no undue burden whatsoever on the religious functioning of the church. (Rec. 328-329).

In view of the fact that the monastery was being supported primarily through Brother Gabriel's work at the parish, and in light of the financial jeopardy that the loss of work would have on the continued existence of the monastery and its mission to serve the poor, Brother Gabriel consulted with his community over what to do. After much soul-searching and discussion of the matter with his community, it was decided that Brother Gabriel could not forsake the wearing of the habit. Brother Gabriel went back to Father Hengle and informed him that he was ready to accept employment, but could not forsake wearing his habit, as this was fundamental to the Brothers' religious beliefs and practices. (Rec. 325, 411-412). Father Hengle thereupon terminated his employment.

Father Hengle admitted that there was no reason other than the refusal to forsake wearing his habit for terminating Brother Gabriel's employment (Rec. 328), that the wearing of the habit had no adverse effect on job performance by Brother Gabriel or any other employee (Rec. 314-315), and that he never received any complaints from anyone regarding Brother Gabriel wearing the habit (Rec. 323). (See Petitioners' Appendix at 12a). While Petitioners' witnesses claimed in justification of termination of employment that the wearing of the habit might cause some hypothetical "confusion" among the parishioners, they failed to present any evidence from anyone allegedly so confused. To the contrary, the only evidence in this regard was from a parishioner and employee of tne parish, Rebecca Ritterbeck, who testified that there was no concern or

"confusion" on anyone's part over Brother Gabriel's status in relation to the church, and that the wearing of the habit was "Positive. I felt it was an open and obvious sign of his Christianity." (Rec. 256-257).

Brother Gabriel brought suit for religious discrimination in employment pursuant to both federal law, 42 U.S.C. § 2000 *et seq.*, and Ohio law, R.C.4112 *et seq*. The case was tried before a jury of eight, and the jury — which had on the panel two Catholics who were members of parishes under the authority of the Diocese of Cleveland — unanimously found for Brother Gabriel on all issues in this cause, awarding him $16,350 in compensatory damages, $16,350 in punitive damages, and attorneys fees. Upon appeal to the Ninth District (Ohio) Court of Appeals, the court reversed the judgment as to the federal claim, finding that the exemption for religious organizations contained in 42 U.S.C. § 2000 *et seq*, as amended in 1972, could not be waived even under the facts of this case, where the Diocese and parish openly and publicly pronounced a mandatory policy of nondiscrimination on religious grounds. The court of appeals went on to affirm the judgment under state law, finding that the exemption for religious organizations under the federal statute was not contained in the Ohio law, and that the issues raised in this case did not involve matters of inner-church government or policy, nor matters involving determination of religious doctrine, and thus did not raise any First An endment concerns. (Petitioners' Appendix at 8a-9a). On further appeal, the Ohio Supreme Court declined to accept jurisdiction in the case, finding "no substantial constitutional question" presented. (Petitioners' Appendix at 1a).

REASONS FOR DENYING THE WRIT

Petitioners' contention that a civil court cannot constitutionally adjudicate disputes over inner church policy, governance, or religious doctrine is a proposition of law that is

so firmly established that it cannot be disputed — but which is simply **not** at issue in this case.

Brother Gabriel at no time brought any claims nor sought any civil adjudication of such issues as whether his community should or should not have been granted sponsorship by the Diocese, or whether his interpretation of the writings of St. Francis were correct and those of formal Franciscans were wrong. The only relevant and essential facts of this case were: (1) that Brother Gabriel's sincerely and intensely held religious beliefs were in conflict with a requirement of his employer in a purely nonreligious job; (2) that the employer failed to make any attempt at accommodation to those personal religious beliefs, and failed to demonstrate any undue burden — or any burden whatsoever — on the business of, or the free exercise of religion by, the employer; and (3) that Brother Gabriel's employment was terminated solely for his adherence to his religious beliefs. By the admissions of Bishop Pilla's own representatives, the Bishop had absolutely no authority or jurisdiction whatsoever to dictate or issue "directives" to Brother Gabriel on matters of religious belief, observance, or dress. Brother Gabriel was not a member of the Roman Rite, nor of the Cleveland Diocese — he was entirely *outside* these institutions — so there simply is no way in which this case can be construed to involve a dispute between competing views over *inner* church doctrines or governance, as Petitioners persist in claiming. The primary issue presented to the jury was whether Brother Gabriel was discriminated against in employment on the basis of his own deeply held personal religious views and practices — *not* whether his views were correct or better, and *not* whether the Catholic Diocese should alter its own doctrinary views or practices.

Petitioners presented their *theory* of the facts in their arguments to the trial court on summary judgment, on directed

verdict, and on judgment notwithstanding the verdict, and strenuously argued this theory of the facts to the jury. Looking at all facts in the light most favorable to Respondent, the trial court rejected these repeated motions. Looking at all the facts and weighing them by the preponderance of the evidence, the jury unanimously rejected Petitioners' factual theory of the case and found in favor of Brother Gabriel. On appeal, Petitioners again argued their theory of the facts (only in the context of an alleged error in denying summary judgment), which the court of appeals properly and unanimously rejected:

> The church's second argument in support of summary judgment was that the trial court denied its rights under the First Amendment. Specifically, it contends that adjudication of this controversy would require the court to examine the propriety of the church's position that Ward could not dress as a Franciscan monk because he did not have the formal recognition of the church. Although it is true that the underlying dispute between Ward and the church was based on this Catholic doctrine, **any inquiry into church doctrine ended there. All that was relevant to this dispute was that there was a conflict between the church's doctrine and Ward's religion and that this conflict led to Ward's termination from employment. There was no need to examine this doctrine any further or to pass upon its propriety. The church, therefore, failed to demonstrate that adjudication of this controversy would require the trial court to delve into church doctrine in violation of the First Amendment**. (Petitioners' Appendix at 8a-9a, emphasis added).

Significantly, this core passage from the opinion of the court of appeals is quoted by Petitioners only in misleading and selective part. (Petition at 9-10).

On appeal to the Ohio Supreme Court, Petitioners failed to raise any issue regarding the propriety of these factual findings by the trial court and the court of appeals, and thus effectively waived or abandoned any issues in this regard.

Petitioners now make a vague argument — for the first time in this case on petition to this Court — regarding allegedly impermissible "prioritizing" of individual religious beliefs over those of religious organizations. Petitioners ignore the cardinal principle that the primary focus of antidiscrimination laws — particularly those prohibiting employment discrimination on the basis of religion — is to protect the rights of *individuals* from discriminatory practices. *Little v. Wuerl*, 929 F.2d 944, 951 (3d Cir. 1991). In the absence of any showing of any attempt at accommodation or any burden whatsoever on the business of the employer or the free exercise of the employer's religion — as was the case here — the Ohio legislature has made the public policy decision to "prioritize" the rights of the individual employee over those of the employer. Petitioners fail to present any argument for finding that the exercise of legislative discretion in this regard is unconstitutional.

A review of Petitioners' briefs submitted to the court of appeals and to the Ohio Supreme Court (Petitioner's Appendix at 207a-290a) will further show that Petitioners' claim that Ohio's antidiscrimination law is unconstitutional unless "some implicit exemption" is found for religious entities (Petition at 19) was never argued to either court. In the court of appeals, Petitioners failed to present this as an assignment of error, and further failed to present any argument in support of this assertion in the body of their brief. Before the Ohio Supreme Court, Petitioners made this assertion in their second proposition of law, but again failed to present any argument in support of such a ruling. Clearly, Petitioners have long ago waived any right to assert such a proposition of law to this Court.

Even if they had been properly raised and coherently articulated in the lower courts, such arguments simply have no merit. Underlying Petitioners' arguments is the erroneous and entirely unsupported premise that the blanket exemption for religious organizations under 42 U.S.C. § 2000e-1 is somehow constitutionally mandated. Petitioners fail to recognize the history and the true nature of this exemption as construed in a substantial body of federal caselaw. The exemption for religious organizations in 42 U.S.C. § 2000e-1 was amended by Congress in 1972 to allow religious organizations to employ persons of a particular religion to carry on the "activities" — both religious and nonreligious — of the organization. *Little v. Wuerl*, 929 F.2d 944, 949-950 (3d Cir. 1991). Prior to that time, the religious exemption was only for the carrying on of the *religious* activities of the organization. *Id.* Contrary to Appellants' implicit contention, the extension of the exemption to include nonreligious activities of a religious organization was not based upon some constitutional concern, but rather was based upon a desire to preserve the *statutory* power of schools and colleges to discriminate on religious grounds in the hiring of all their employees. *Id.* at 950.

In *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 97 L. Ed. 2d 273, 107 S. Ct. 2862 (1987), this Court addressed a constitutional challenge to the 1972 extension of the exemption to nonreligious activities. While the Court after extensive analysis found that this extension was not **un**constitutional — i.e., that it was constitutionally *permissible* to exempt religious organizations from claims of discrimination in nonreligious activities — there is nothing in that case that supports the proposition that this extended exemption is a constitutional imperative. For the Court to hold that a legislative act is constitutionally permissible is far from holding that the act is constitutionally mandated, as Petitioners appear to claim.

Petitioners fail to cite any authority in support of the premise that the neutral application of laws against employment discrimination on the basis of religion to a religious organization in purely nonreligious activities is inherently unconstitutional, nor have they cited any cases holding that the pre-1972 federal statute was unconstitutional in this regard, nor any cases holding that a state statute that does not contain such a blanket exemption is thereby unconstitutional. The very fact that this Court had to decide whether the extension of the exemption to nonreligious activities was in itself unconstitutional, refutes Petitioners' implicit contention that such an exemption is required by the Constitution.

Contrary to Petitioners' assertions, the decision of the court of appeals is entirely consistent with this Court's precedents that have established the general principle that neutral laws of general application do not violate First Amendment rights of religious organizations, absent a showing of undue burden on the free exercise of religion. *See Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990); *City of Boerne v. Flores*, 521 U.S. __, 117 S. Ct. 2157, 138 L. Ed. 2d 624 (1997). Petitioners fail to acknowledge the operation of this principle in the present case, and fail to present any basis for this Court to reverse or modify this principle. Further, Petitioners have failed at all levels of this case to assert or articulate any argument grounded in the law for finding that the Ohio antidiscrimination law is unconstitutional as applied under the actual facts of this case, i.e., where the position was purely nonreligious in nature, and where there was no demonstration whatsoever of any burden on the religious or business activities of the employer. Instead, Petitioners have persistently and pointedly avoided this question — the only real issue that might have been asserted in this case — choosing instead to argue irrelevant issues, to cite inapplicable authority, and to promote their own erroneous

version of the facts, in an attempt to induce some court at some level to rule in their favor.

In order to reach the issues as posed by Petitioners, this Court would first have to review and weigh the evidence at trial, and then conclude that the trial court and the appellate court were unanimously in error in finding that this case did not involve any issues of inner-church doctrine, policy, or governance. In effect, Petitioners are asking this Court to exercise its jurisdiction in order to function as a "super-jury" to reexamine settled questions of fact. It has long been held that this Court will not grant certiorari merely to review evidence or inferences drawn from it. *General Talking Pictures Corp. v. Western Electric Co.*, 304 U.S. 175, 82 L. Ed. 1273, 58 S. Ct. 849 (1938).

It is also well established that this Court will not review a state court decision that does not actually decide a federal question. *Harding v. Illinois*, 196 U.S. 78, 25 S. Ct. 176, 49 L. Ed. 394 (1904). Neither the trial court nor the court of appeals actually decided any First Amendment issue, nor did they decide any such issue contrary to well-established law. While implicitly acknowledging the undisputed premise that civil courts cannot constitutionally adjudicate disputes over religious doctrine or inner-church governance, the courts below merely found on the basis of the facts presented that the First Amendment was not implicated in this case. Contrary to Petitioners' claim, this process did not involve any inordinate "struggling" with this Court's precedents to reach the proper factual determination, either in the present case or in any of the other state court decisions cited by Petitioners (*See* Petition at 18, n. 33). The court of appeals did not address nor rule on the question of whether Ohio's antidiscrimination statute is unconstitutional for lack of the blanket exemption contained in the federal statute, as this issue was never presented to that

court. (*See* Petitioners' Appendix at 2a-16a, 207a-267a). Accordingly, the Ohio Supreme Court rejected Petitioners' appeal, as there was "no substantial constitutional question" presented. (Petitioners' Appendix at 1a). Petitioners therefore fail to present any issue in this regard that is appropriate for review by this Court.

The rulings of the courts below involved nothing more than the determination and application of Ohio state law. As Petitioners have failed to demonstrate that these decisions rested on anything other than adequate and independent state-law grounds, and have failed to articulate and preserve any constitutional challenges to the application of Ohio's law under the actual facts of this case, they have failed to present any federal or constitutional issue worthy of review by this Court. See *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 1210, 65 S. Ct. 1475, 89 L. Ed. 2092 (1945).

CONCLUSION

For the reasons above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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